APPENDIX C

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SECURITY PACIFIC FINANCIAL SERVICES, INC., Plaintiff and Respondent, v. RICHARD E. WHITE et al., Defendants and Appellants.	D029409 (Super. Ct. No. 705440) **Filed** **April 19, 1999**

APPEAL from a judgment of the Superior Court of San Diego County, Anthony C. Joseph, Judge. Affirmed.

In this action on a promissory note, Richard E. White and Janet B. White appeal from a summary judgment entered in favor of plaintiff, Security Pacific Financial Services, Inc. (Security Pacific). We conclude the trial court properly determined the Whites' evidence was barred by the parol evidence rule and Security Pacific was entitled to summary judgement as a matter of law. Accordingly, we affirm the judgement.

BACKGROUND

Security Pacific's complaint alleges the Whites entered into a promissory note on October 28, 1993. The note was modified on December 30, 1994, requiring White to pay $78,333.79 in monthly installments of $1,043.40, beginning January 30, 1995. The Whites had defaulted on the note, and the deed of trust securing the note had been rendered valueless "by virtue of a foreclosure proceeding by a senior lienholder." Security Pacific sought $78,204.79 in principal, interest at the rate of 15.55 percent per year and attorney fees, as provided in the note.

In answering, the Whites, in propria persona, alleged the note "should be rescinded or cancelled . . . because it was created through the fraud of plaintiff [.]" Security Pacific assertively "misrepresented to defendants that [it] could proceed with further legal action if property was foreclosed upon."

Security Pacific moved for summary judgment. In its separate statement, Security Pacific asserted it was undisputed that the Whites executed the promissory note and defaulted on it; the note was secured by a third deed of trust, however, the proceeds from the note were not used to purchase the property; a senior lienholder foreclosed on the property in April 1996 and no portion of the sale proceeds remained to be applied to Security Pacific's note; and the note provided for annual interest of 15.55 percent and reasonable attorney fees in any collection action. Dave Torlone, a Security Pacific collection officer, attested to these facts in a declaration.

Security Pacific also submitted copies of the "Combined Note and Security Agreement, in the "Modification Agreement" and the Deed of Trust and Assignment of Rents." The note provided that upon default, Security Pacific could declare the remaining balance immediately due, and the Whites were responsible for any costs associated with enforcing a judgment-against them. The modification increased the monthly payment amount and extended the note's maturity date; in all other respects the note terms were unchanged.

In their separate-statement, the Whites asserted: "Plaintiff's misrepresentations about the note induced defendants to execute the note," and "[p]laintiff's employees' conduct prevented defendants from discovering the falsity of plaintiff's employees misrepresentations. "In support, they filed a joint declaration stating in pertinent part:

"2. At the time of execution of plaintiff's note, and although we were available to execute it during plaintiff's normal business hours and under normal circumstances, plaintiff's loan personnel did not notify us to come in to execute the note and trust deed until right before the close of their business for the day and told us that if we did not come in that day, they would not make us the loan. As a result, we had no time to read the documents which plaintiffs loan personnel required us to sign. Even to sign the note and related papers kept us at plaintiffs bank branch well after it closed for the day. _.

"3. Although we did not have time to read the loan documents, we did ask plaintiff's loan employees whether or not, if the loan went into default, we would be personally liable for its payment, and were informed by plaintiff's employees that plaintiff would foreclose its

note against the 'property and would obtain repayment through the foreclosure sale of the property, and not from us personally. In reliance on that representation from plaintiff's employees, we signed the note and deed of trust and other documents presented to us by plaintiff. But for plaintiff's employees' statements that plaintiff would look solely to the property for repayment of its loan in the event of default, we would not have signed the note."[1]

The Whites did not respond to the points Security Pacific raised in its separate statement, as required. (Code of Civil Procedure,[2] § 437c, subd. (b).) The asserted facts therein were thus undisputed.

In a tentative telephonic ruling, the court granted Security Pacific's motion as the undisputed evidence showed it was entitled to judgment as a matter of law. The court sustained Security Pacific's objection to the Whites' declaration as violative of the parol evidence rule. It further explained, in [t]he fraud exception to the parol evidence rules does not apply as' the evidence sought to be introduced is of a fraudulent promise which directly contradicts the express terms of the integrated written agreement." After oral argument, in which attorney specially appeared for the Whites, the court confirmed its ruling. Judgment was entered on September 29, 1997.

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[1] On appeal, the Whites claim they were fraudulently induced to sign the modification agreement, as opposed to the promissory note and deed of trust. The discrepancy does not, however, affect our analysis.

[2] All statutory references are to the Code of Civil Procedure unless otherwise specified.

The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the "integration"), *becomes the contract of the parties.* The point then is, not how the agreement is to be proved, because as a matter of law the writing-is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself.' [Citations.]" (*Id.* at § 963, p. 911, original italics.)

The Whites contend they raised a triable issue of fact regarding whether Security Pacific fraudulently induced them to execute the promissory note by assuring them its sole recourse upon default would be under the deed of trust which collateralized the loan. There is a so-called fraud exception" to the parol evidence rule. Subdivision (g) of section 1856 provides in pertinent part, n [t]his section does not exclude other evidence . . . to establish illegality or fraud." The provision, however, is unavailing to the Whites.

"'Promissory fraud' is a promise made without any intention of performing it. [Citations.] The fraud exception to the parol evidence rule does not apply to such promissory fraud if the evidence in question is offered to show a promise which *contradicts an integrated written agreement.* Unless the false promise is either independent of or consistent with the written instrument, evidence thereof is inadmissible. [Citations.] [§] The law in California was stated by our Supreme Court as follows:
"Our conception of the rule which permits parol evidence of fraud to establish the invalidity of an instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the

writing.' [Citation.]" (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1436-1437, italics added; accord, *Simmons v. Cal. Institute of Technology* (1949) 34 Cal.2d 264, 274; *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263; 2 Witkin, *supra,* § 1000 p. 945.)

> Here, the "DEFAULT" paragraph of the promissory note provides in pertinent part:
> "If I (l) don't pay on time, . . . you may (a) remedy my default and charge Interest at the Contract Rate on amounts you pay, and (b) declare all I owe immediately due. [§] I will pay your court costs and reasonable attorney fees', including fees incurred in collecting and enforcing any judgment, if the original Amount Financed is $5,000.00 or more."

While the note does not specifically state the Whites were personally liable notwithstanding the deed of trust, no other conclusion may be drawn from the provision Security Pacific could obtain a *judgment* against them for the outstanding balance on the note at the time of default.[4] The Whites' declaration that Security Pacific assured them it would seek recourse only through the collateral was directly at odds with the note, and thus the court properly excluded it under the parol evidence rule. Because Security Pacific indisputably established the elements of its cause of action, it was entitled to summary judgment as a matter of law.[5]

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[4] A mortgagor may be liable for a deficiency judgment where, as here, the collateral was not given to secure payment of the balance of the purchase price of the encumbered property, or to secure repayment of a loan which was used to pay any part of the purchase price of a dwelling occupied by the purchaser. (§§ 580b, 726, subd. (b).)

II
DISCUSSION
A

Summary judgment is proper only where there is no triable issue of materiel fact and the moving party is entitled to judgment as a matter of law. (§ 473c, subd. (c).) We review the trial court's granting of the summary judgment motion de novo. *(Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.) "In doing so, we must strictly scrutinize the moving party's papers. [Citation.] The declarations of the party opposing summary Judgment, however, are liberally construed to determine the existence of triable issues of fact. [Citation.] All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. [Citation.] n *(Barber v. Harina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

B

"The parol evidence rule, with certain exceptions, prohibits the introduction of any; *extrinsic evidence* (oral or-written) to vary or add to the terms of an *integrated written-instrument* (a contract, deed or will". [citations.]"[3] (2 Witkin, Cal. Evidence (3d ed. 1986) § 960, p. 908, original italics.) The parol evidence rule does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission.

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[3] Section 1856, subdivision (a) provides: "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement."

[5] Plaintiffs' argument on appeal is largely devoted to the notion they were harmed by their counsel's failure to discuss at the hearing on the summary judgment motion each of the numerous issues they raised in their points and authorities. Counsel's conduct is, of course, not at issue in this appeal. In any event, the trial court may decide a motion solely on the basis of the parties' affidavits and is not required to even entertain oral argument. (Wilburn *v. Oakland Hospital* (1989) 213 Cal.App.3d 1107, 1111.) Under the circumstances here, it appears no argument of the Whites' counsel would have resulted in a more favorable outcome to them.

The Whites cursorily raise a variety of other issues—for instance, that the promissory note was not an integrated agreement and thus the parol evidence rule is inapplicable. We do not consider that and other issues which the Whites failed to address in their separate statement. (See *Maryland Casualty Co.* v. Bailey & *Sons, Inc.* ti995) 35 Cal.App.4th 856, 870, fn. 11.)

DISPOSITION

The judgment is affirmed. Security Pacific to recover costs on appeal.

S/HUFFMAN, Acting P.J.

WE CONCUR:

S/NARES, J.

S/ HALLER, J.